In the Supreme Court of the United States.

OCTOBER TERM, 1918.

WILLIAM F. BROTHERS, APPELLANT,
v.
THE UNITED STATES.
No. 309.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The appellant sued for damages for the infringement of a patent on "improvements in cable cranes with gravity anchors," claiming that the United States had infringed the patent during the construction of the Panama Canal. The Court of Claims found against him and dismissed his suit.

STATEMENT OF THE CASE.

The appellant applied for his patent in 1895, and it was granted December 17 of that year to his assignees. It was subsequently assigned a number of times, and finally was reassigned to the appellant on February 27, 1912, just two and a half months before it expired.

The claim is that this patent was infringed by certain cableways used by the Government in the

construction of the Panama Canal, beginning in 1909 and continuing until the expiration of the patent. The cableways alleged to be infringements were constructed in 1909, and were in use by the Government on June 25, 1910, when the act was passed permitting suits in the Court of Claims against the United States for infringement of patents. The alleged infringement consists in the use of tilting or yielding towers. The Court of Claims has found that—

> Subsequent to the construction and installation of said cableways they were maintained and operated without change in structural form or method of operation other than that as the height of the walls and other work of the canal increased, beginning about August, 1910, it became necessary, in order to admit of the loads being carried to pass clear of the works and men engaged thereon as the height of the work increased, to take up the slack or decrease the deflection of the cable. The cables were accordingly drawn up for said purpose. This tightening up of the cables or reduction of their deflection increased the effect of the load and weight of the cables upon the towers as regards their tendency to yield or tilt.

And also:

> It was the intent and purpose of the engineer officers of the Canal Commission, by and under whom said cableways were designed, constructed, and operated, that the towers thereof should be rigid and nonyielding to the full

extent that rigidity in cable towers was possible; and there was no tilting or yielding of said towers other than such as resulted from a yielding of the roadbed of the tracks supporting them, portions of which roadbed consisted of "fills" of excavated materials upon swampy ground. There is no satisfactory evidence that the towers either yielded or tilted at any time during the period of claimant's ownership of said letters patent.

BRIEF.

I.

RIGHT TO RECOVERY LIMITED TO TWO AND ONE-HALF MONTHS.

Since the appellant was not the owner of the patent when the cableways were constructed and only for two and one-half months during the time that they were used, his right to recovery would in any event be limited to a recovery for the use of his patent during this two and one-half months, for the reason that there could be no assignment of any claim against the Government to him arising prior to the time he became the owner of the patent. (Sec. 3477, Revised Statutes.)

II.

NO RIGHT TO RECOVERY FOR USE OF CABLEWAYS IN USE BY THE GOVERNMENT IN 1910.

As stated above, the cableways in question were constructed in 1909, and were thereafter in continuous use by the Government. The right of appellant to sue for an infringement of his patent rests

wholly upon the act of June 25, 1910 (36 Stat., 851), which gave permission to sue the United States on such claims. But that act contains this proviso:

> *Provided, however,* That said Court of Claims shall not entertain a suit or reward compensation under the provisions of this act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States.

It follows, of course, that the United States has not consented to be sued for using the cableways which it was using when this act was passed, and nothing more appearing, it would be clear that appellant had no standing in court.

III.

NO INFRINGEMENT BY CHANGES IN CABLEWAYS AFTER 1910.

The appellant's only claim, therefore, rests upon the allegation that after the passage of the act above referred to such changes were made by the Government in its cableways as to amount to an infringement of the patent in question. This, of course, involves an admission that as originally constructed the cableways did not infringe. If the Government was infringing the patent when the act of 1910 was passed, it could continue to infringe it without being subject to suit.

Appellant, then, can recover only on the theory that the original construction of the cableways did

not infringe, but that afterwards the infringement occurred through a change in the cableways. Whether such changes did occur or not must now be determined from the facts which appellant has brought here in the shape of findings of fact by the Court of Claims.

The two paragraphs quoted above from the findings of fact contain every fact found by the court relating in the remotest degree to changes occurring after the passage of the act of 1910. Unless something can be found in them which establishes the alleged infringement, the appeal must fail. The question, then, is, do the facts found show that after the passage of the act of 1910, and during the two and one-half months that appellant owned the patent, the Government infringed that patent by using tilting or yielding towers? The Court of Claims has found that the purpose was to make these towers as rigid and nonyielding as was possible, and that there was no tilting or yielding of the towers other than such as resulted from the yielding of the roadbed of the tracks supporting the towers at places where these tracks rested on foundations not as firm as they might be. This in itself would be conclusive against any claim that yielding or tilting towers were used. But with respect to the time during which appellant owned the patent the court is even more explicit and finds that there is no satisfactory evidence that the towers either yielded or tilted at any time during that period.

IV.

It is respectfully submitted that the above findings are conclusive against the appellant, and the judgment of the Court of Claims should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

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